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No. 88-206

In The
Supreme Court of the United States
October Term, 1988

ROBERT L. TUCKER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT L. TUCKER, Petitioner

v.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

REASONS FOR GRANTING THE WRIT

For the following reasons, the necessity of Supreme Court review of this case is clear.

1. While the government argues that the use of ex parte proceedings

after Batson will not be widespread and that present review of this issue would be premature, (Opp.Cert. 9 n.3), the number of circuit courts already required to deal with this issue demonstrates sufficient need to warrant this Court's guidance on a fundamental and important issue of equal justice. The issue has arisen again in the Ninth and Fourth Circuits since the Thompson and Garrison decisions. United States v. Alcantar, 832 F.2d 1175 (9th Cir. 1988); United States v. Tindle, 860 F.2d 125 (4th Cir. 1988). Moreover, since Petitioner filed his cert. petition, two other parties have sought this Court's review of this basic question regarding the proper implementation of Batson. Tindle, supra, petition for cert. filed, No. 88-1379 (Feb. 17, 1989); Garrison, supra,

petition for cert. filed, No. 88-5824, (Nov. 4, 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 566 (1988).[1]

2. The government's attempt to cast the conflicting decisions of the courts of appeals in a harmonizing light is unavailing. What the government portrays as simple "differences in emphasis" among the courts of appeal (Opp.Cert. 9), are in reality sharply conflicting rules.

On one side of the issue sit the Ninth and Fourth Circuits, which have

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[1] Of course, Petitioner himself has a compelling interest remaining that this Court should not ignore. Following his conviction, Petitioner surrendered his license to practice law, but he was recently reinstated to the Illinois bar. See In re: Robert Lee Tucker, No. M.R. 4706 (Ill.Sup.Ct. Mar. 29, 1989). Thus, the only stigma remaining on his otherwise exemplary record is this conviction.

established a right of participation for defendants such as Petitioner who have already demonstrated a prima facie Batson violation. These courts have held that such a defendant is constitutionally entitled to an opportunity to hear and respond to the government's purportedly race neutral reasons for striking black venirepersons, unless the government demonstrates a compelling interest to the contrary.[2] United States v. Thompson, 827 F.2d 1254, 1258-59 (9th Cir. 1987);

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[2] Contrary to the government's charge (Opp.Cert. 7), Petitioner obviously does not seek a "per se" rule of an adversarial hearing in every case. The scope of any hearing may be determined by the needs of the particular case. But, in the absence of a compelling reason, defendants who have established a prima facie Batson case minimally should be afforded the basic elements of due process, an opportunity to hear the government's reasons and to respond. That was not done in this case.

United States v. Garrison, 849 F.2d 103, 106 (4th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 566 (1988); see also United States v. Tindle, 860 F.2d 125, 131 (4th Cir. 1988), petition for cert. filed, No. 88-1379 (Feb. 17, 1989).

To the contrary are the Sixth Circuit, United States v. Davis, 809 F.2d 1194, 1202 (6th Cir.) (defendant's participation not always inappropriate), cert. denied, ___ U.S. ___, 107 S.Ct. 3234-35 (1987), and the Seventh Circuit in this case, which have held that a defendant so poised is entitled to no adversarial process. Without providing any meaningful or reviewable instruction to guide the lower courts, these decisions simply permit a trial court, in its discretion, to allow defendants to participate in unspecified circumstances.

(Pet. B11-B12).[3]

A constitutional requirement of adversarial pre-trial proceedings is certainly not without precedent. In order to properly enforce the Fourth Amendment, this Court in Franks v. Delaware, 438 U.S. 154, 155-56 (1978), required trial courts to hold adversarial evidentiary hearings after a defendant made a "substantial preliminary showing" that the affiant for a search warrant had recklessly or intentionally falsified statements underlying probable cause. Certainly no less can be required where, as here, the defendant has established a

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[3] What circumstances those would be are difficult to imagine, given the Seventh Circuit's observation in Petitioner's case that the prosecution could have disclosed its reasons for excluding all the black venire members in open court without compromising any government interest. (Pet. B12).

prima facie claim of intentional race discrimination.

3. In an attempt to minimize the extent of the harm to Robert Tucker, the government wrongly asserts that nothing more could have been accomplished by Petitioner's participation in the ex parte Batson hearing and that the record of that proceeding is complete and left "no doubt that the prosecutor's motives were proper." (Opp.Cert. 7, 11). In fact, Petitioner's presence at the Batson inquiry would have contributed to the process in three significant ways.

First, such participation would have permitted Petitioner to point out to the district court that sufficient facts had not been developed upon which the court could adequately evaluate the legitimacy

of the government's explanations.

The trial court could not "assess the validity of the prosecutor's reasons" by comparing the actual extent of the education and business experience of the blacks whom the government struck with the qualifications of the all-white jury members who served without government objection, (Opp.Cert. 11), because those backgrounds were never fully developed.[4]

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[4] The government's assertion that the profile of the selected jurors "validates" the government's ex parte explanation of its reasons for striking black jurors is suspect. (Opp.Cert. 7 n.2). A close examination of the voir dire transcript reveals that the government's characterization of these jurors' qualifications requires more than a liberal reading of the record. In a somewhat confusing statement, the government asserts that four of the selected white jurors had "college or post-graduate degrees" (Opp.Cert. 7 n.2)(emphasis added). In fact, there were four jurors with a college education, but none held anything more than a bachelor's degree. (V.D. Tr. 18-

The government's assertion that each potential juror offered information about his or her education and employment (Opp.Cert. 11), is simply untrue and not supported by the record. The voir dire at Petitioner's trial was sketchy and

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22). The four who had completed high school and had, according to the government, "substantial or responsible employment," include a garden shop manager at K-Mart (V.D. Tr. 35), a truck driver (V.D. 50), a retired fast-food store manager (V.D. Tr. 32-33) and a payroll clerk (V.D. Tr. 52). Finally, the government's most extreme assertion is that one alternate juror's lack of a high school education was compensated for by her "secretarial skills and work experience." (Opp.Cert. 7 n.2). In fact, this white juror, in her own words had only "some secretarial background work skills" and had "worked for 3M Company as a packer in a factory". (V.D. Tr. 54). Her selection was surely inconsistent with the prosecution's desire to pick jurors educated "beyond high school" and "experienced in business." (V.D. Tr. 80). Due to illness of another juror, this alternate sat on the jury that convicted Petitioner. (Tr. 697).

unprobing. (V.D. Tr. 2-64). Many venirepersons gave incomplete responses to the court's open-ended inquiry about their backgrounds and several omitted either their educational level or the type of work experience they had. (V.D. Tr. 14-15, 34-35, 35-36, 57).[5]

For instance, the government's

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[5] Moreover, despite its purported concern about selecting a highly-educated jury with substantial business experience, the government failed to request the court to inquire further, whether the incomplete responses were given by white or black venire members. Indeed, the appropriate way to protect the prosecution's purported concerns about education and business experience would have been to request further voir dire. See United States v. Tindle, 860 F.2d 125, 134 n.1 (4th Cir. 1988) (Murnaghan, J., dissenting). Thus, in fulfillment of Batson's mandate to make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," 476 U.S. at 93, the prosecution's failure to pursue this information about the black venirepersons is relevant, but unmentioned by the courts below.

assertion that only one of the blacks stricken from the venire had graduated from high school is misleading and not entirely determinable from the information elicited during voir dire. (Opp.Cert. 3). In addition to Perry White, a high school graduate (V.D. Tr. 21-22), David Bennett had a high school equivalency. (V.D. Tr. 54-55). Emma Jackson stated that "I went to Wells High School," without elaborating, or being asked to elaborate, whether she had graduated. (V.D. Tr. 34-35). Nor did the record adequately clarify the extent of David Bennett's 25 years of experience in "scrap metal recycling." (V.D. Tr. 54-55). From the scant record that was developed, it is equally plausible that Bennett was operating a lucrative and complex commercial recycling business as

it is that he was collecting discarded aluminum cans on the streets.

As this Court has observed, "[t]he usual reliance of our legal system on adversary proceedings itself should be an indication that an ex parte inquiry is likely to be less vigorous. Franks v. Delaware, 438 U.S. 154, 169 (1978). By conducting an ex parte examination of the prosecutors' motivations and refusing Petitioner the chance even to hear the government's explanations, the trial court prevented Petitioner from being able to respond at the most appropriate time--while the venire members were still present in the courtroom. (V.D. Tr. 71). Had Petitioner been afforded this basic opportunity at trial, he could have responded in a meaningful manner. (Pet. 10-14).

A second interest Petitioner's participation would have advanced is the protection of potential black jurors. Batson protects not only the rights of defendants, but also the rights of black jurors not to be discriminated against. 476 U.S. at 87. Thus, it was not simply what the trial court knew (that the prosecutors knew) that is relevant to the Batson claim here. That court had an independent duty to protect the black venire members' rights by making an "assessment of individual qualifications," id., to ensure that the blacks actually lacked that which the government believed was necessary to be a juror.

Finally, Petitioner's presence could have ensured that the reviewing courts had a sufficient record by adequately

developing the factual basis for the prosecution's peremptory challenges. For example, there is no way to determine from the record which white venirepersons were struck by the government (see infra). Accordingly, there is no way that an appellate court can review the validity of the government's contention that it struck all venirepersons for the same reasons. (V.D. Tr. 80).

4. The government also is wrong when it asserts that whatever the deficiencies at trial, the §2255 procedures cured the problem and that there was no other evidence that

Petitioner could have offered or developed.[6]

The procedures undertaken by the district court on the §2255 petition were insufficient to ensure that Petitioner's rights were not violated. In his request for relief, Petitioner asked for an order setting aside his conviction and sentence or, in the alternative, for some sort of hearing to resolve whether the prosecution had adequately met its burden under Batson. (R. 280, R. 286). The

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[6] The government points to this supposed absence of "additional facts" both in support of its contention that Petitioner has already received sufficient adversarial process, and its assertion that Petitioner has had an adequate opportunity to develop a record that can be reviewed under the clearly erroneous standard (Opp.Cert. 9-11). Because such additional facts are clearly available, the government's response fails on both points.

district court, however, denied relief without oral argument or hearing. (Pet. C1-C3).

Thus, Tucker had to argue his §2255 petition with only an incomplete factual record, a venire that had long since departed and a transcript of an ex parte proceeding in which he was denied participation. From this Petitioner could, at best, articulate objections to the prosecutor's race neutral excuses for removing all blacks from the venire and point out, in the abstract, why these reasons might be deficient or constitute a pretext for discriminatory intent. However, if this showing did nothing more, it at least established his entitlement to the actual hearing he was requesting.

Had he been provided a hearing, even

on his §2255 petition, Tucker was likely to demonstrate that the prosecution's race neutral explanations were either pretextual or otherwise unfounded.

For example, given a §2255 hearing, Petitioner might have been able to subpoena the white venirepersons to identify those who were excluded by the government. From this, the court could have determined whether government peremptory strikes of those venire members were exercised consistent with the prosecution's explanation that it struck only jurors who were not educated "beyond high school," and who were "not sophisticated in terms of dealing with business." (V.D. Tr. 80).

CONCLUSION

Unless the Court assures that the Batson inquiry affords defendants the

basic opportunity to hear and respond to the prosecution's rebuttal to a prima facie discrimination claim, the promise of Batson will be illusory. Petitioner's case illustrates this all too clearly. Though the Court of Appeals held there was no reason to depart from regular adversarial process, the trial court did so, and consequently could not adequately determine whether a circumstantial case of discrimination existed. Unchallenged, the prosecution was permitted to present only generalized and vague reasons for striking black venirepersons and no additional voir dire questions that might substantiate those reasons were requested. Even with the limited facts available, however, it was clear that some blacks had education and business experience equivalent to that of whites

who were seated on the jury. On the present state of the record, no meaningful appellate review of the trial court's determination is possible.

For these reasons, as well as those set forth in the petition, the Court should issue a writ of certiorari to review the judgment and decision of the Seventh Circuit in Petitioner's case.

Respectfully submitted,

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